



Legal Update

June 10, 2014

The First Circuit Court holds that a citizen has a First Amendment right to videotape police during a traffic stop unless the police can reasonably conclude that the filming or the actions of the citizen are interfering with police duties.

Gericke, Plaintiff v. Begin, Appellee, U.S. Court of Appeals, 1st Circuit No. 12-2326 (2014)

Background: Carla Gericke (hereinafter referred to as “Gericke”) was caravanning in two cars to her friend Tyler Hanslin’s (hereinafter referred to as “Hanslin”) house. Sergeant Joseph Kelley (hereinafter referred to as “Sgt. Kelley”) stopped Hanslin for a traffic violation. Gericke thought Sergeant Kelley was stopping her so she pulled her vehicle over on the side of the highway. Hanslin stopped his vehicle in front of Gericke’s vehicle while Sgt. Kelly parked between both vehicles. Sgt. Kelly told Gericke he was signaling Hanslin to stop. When Hanslin disclosed that he had a firearm Sgt. Kelley ordered him out of the vehicle and asked Gericke to move her vehicle. Gericke complied and stood at least thirty feet away announcing she was going to videotape the incident. Even though Gericke’s camera failed to record the incident, Sgt. Kelley did not ask Gericke to stop recording nor did he ask her to leave the area. Gericke returned to her vehicle and placed the camera on the vehicle’s center console. Another officer responded to assist while Sergeant Kelley confirmed that Hanslin was properly licensed to carry a firearm. Sergeant Kelley never drew his weapon. In her deposition, Gericke stated that she thought there were three people in an additional civilian car that arrived to “take a look and make sure everyone was safe.” The responding officer who arrived to assist Sgt. Kelley demanded Gericke produce her camera. When Gericke refused to give the officer her camera, he arrested her for disobeying a police order and illegal wiretapping.

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Gericke sued the Town of Weare, its police department, and the officers under 42 U.S.C. § 1983 claim, alleging that the officers violated her First Amendment rights when they charged her with illegal wiretapping in retaliation for videotaping the traffic stop. The police officers filed a motion for summary judgment arguing that they were entitled to **qualified immunity** on Gericke's First Amendment retaliation claim "because there was no **clearly established** right to film the traffic stop." The district court denied the police officer's motion for qualified immunity because some of the facts were in dispute. The district court cited **Glik**, "a reasonable officer should have known that a blanket prohibition on the recording of all traffic stops, no matter the circumstances was not constitutionally permissible." **Glik v. Cunniffe**, 655 F.3d 78 (1st Cir. 2011). Additionally, **Glik** "clearly established that police officers cannot prosecute citizens for violating wiretapping laws when they peacefully record a police officer performing his or her official duties in a public area." **Id.** at 6. However, there is not a clearly established First Amendment right to record in a disruptive manner the public activity of police officers. **Id.** at 6.

Conclusion: The issue before the Court was whether the officers were entitled to qualified immunity in response to Gericke's claim. The Court held that the police officers were not entitled to qualified immunity because Gericke's rights were **clearly established** at the time of incident and were violated when the police officers charged her with illegal wiretapping. Qualified immunity shields police officers from civil liability.

There is a two prong test used to determine whether a defendant is entitled to qualified immunity. **Glik**, 655 F.3d at 81. In order to determine whether the police officers were entitled to qualified immunity, the Court had to answer (1) whether Gericke was exercising a constitutionally protected right to film the police during the traffic stop, and (2) whether that right was clearly established at the time of the stop.

1st Issue: Did Gericke have the right to film police during a traffic stop?

The Court concluded that Gericke did have a right to film police during a traffic stop and it relied upon **Glik** which established that the "First Amendment protects a range of conduct surrounding the gathering and dissemination of information, and that individuals have the right to videotape police officers performing their duties in public either during a traffic stop or an arrest in public." **Glik** at 79. While the Court recognized that the facts in the underlying case differ from **Glik**, Gericke still had a constitutional right to film police performing their public duties even though she was filming police during a traffic stop and not an arrest in a park. **Glik**, **Id.** at 7. Since "traffic stops are inescapably a police duty carried out in public," individuals can film police. **Id.** at 82.

In its analysis, the Court considered whether in some circumstances police can restrict a citizen filming a traffic stop even if it may violate a person's First Amendment right. The Court in **Glik** noted that "a traffic stop is worlds apart from an arrest on the Boston Common in the circumstances alleged." **Id.** at 85. Since traffic stops may be "especially fraught with danger to police officers" and thus justify more invasive police action than would be permitted in other settings. **Arizona v. Johnson**, 555 U.S. 323, 330 (2009). Officers may insist that passengers exit the vehicle without even a reasonable suspicion that they were engaged in wrongdoing during a traffic stop. **Maryland v. Wilson**, 519 U.S. **ACLU of Ill. v. Alvarez**, 679 F.3d 583, 607 (7th Cir. 2012) (Reasonable orders to maintain safety and control, which have incidental effects on an individual's exercise of the First Amendment right to record, may be permissible.) Additionally, a police officer may also request identifying information from passengers in a traffic stop without particularized suspicion that they pose a safety

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risk or are violating the law, "so long as the request does not 'measurably extend the duration of the stop.'" *United States v. Fernandez*, 600 F. 3d 56.

"Reasonable restrictions may be imposed on the exercise of the right to film may be imposed when the circumstances justify them." See *Glik*, at 84. "The circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure - for example, a command that bystanders disperse - that would incidentally impact an individual's exercise of the First Amendment right to film. Such an order, even when directed at a person who is filming, may be appropriate for legitimate safety reasons." However, a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties. Importantly, an individual's exercise of her First Amendment right to film police activity carried out in public, including a traffic stop, **necessarily remains unfettered unless and until a reasonable restriction is imposed or in place.** 408, 413-15 (1997).

In the underlying case, the Court found that neither Sgt. Kelley nor the responding police officers imposed any restrictions on Gericke while she was filming. Sgt. Kelley only asked Gericke to return to her vehicle. Sgt. Kelley never ordered Gericke to stop filming nor did he ask her to leave the area. The facts as presented suggest that Gericke's "**right to film remained unfettered**" and the officers violated her First Amendment right by filing the wiretapping charge without probable cause in retaliation for her attempted filming.

2nd Issue: Was Gericke's right clearly established at the time of stop?

The police officers argued that Gericke did not have a *clearly established* right to film at the time of the late-night traffic stop, involving a firearm, along with multiple vehicles and citizens. Based on the facts presented in this case, the Court did not agree with the officers' arguments because it found that Gericke's right to film was *clearly established* and not restricted. Gericke's attempt to film Sgt. Kelley during the traffic stop was unmistakably an attempt to film a law enforcement officer in the discharge of his duties in a public space. Therefore, as the events in *Glik* occurred well over two years before the events here, Gericke's right to film the traffic stop was clearly established unless it was reasonably restricted. According to Gericke, Sgt. Kelley did not order her to stop filming nor did he order her to leave because of a safety concern. If Sgt. Kelley had directed her to leave, the Court's ruling may have been different. As the Court highlighted in its analysis, the nature of traffic stops is more dangerous and in certain circumstances police may have to take action to insure the safety of bystanders or others. As a byproduct of police performing their duties, a person's First Amendment Rights to film may be restricted. Here, the police were not entitled to "qualified immunity" when they charged Gericke with illegal wiretapping because they never restricted her right to film the incident and her right to film was clearly established.

Commentary: *Gericke* is an important case because it suggests that police can restrict individuals filming law enforcement while performing law enforcement duties if a reasonable officer would believe safety is at risk. When the Court issued its ruling in *Glik*, most citizens assumed that they could film police performing public duties without any limitations. *Gericke* highlights that citizens can film police officers carrying out their duties even during a traffic stop unless a police officer can reasonably conclude that the filming is interfering with

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police duties. **With the increased use of cell phones and other digital devices, law enforcement should assume that they are always being recorded.**

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